

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**GARY ELSBERND**

**Winneshiek County, Iowa**

ADMINISTRATIVE CONSENT ORDER  
NO. 2011-AFO-19

TO: Gary Elsbernd  
1538 230<sup>th</sup> Avenue  
Calmar, Iowa 52132

**I. SUMMARY**

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Gary Elsbernd for the purpose of resolving violations resulting from a manure discharge from Mr. Elsbernd's animal feeding operation that resulted in water quality violations and a fish kill. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

**Relating to technical requirements:**

Doug Hawker, Field Office 1  
Iowa Department of Natural Resources  
909 West Street, Suite 4  
Manchester, Iowa 52057  
Phone: 563/927-2640

**Relating to legal requirements:**

Kelli Book, Attorney for the DNR  
Iowa Department of Natural Resources  
7900 Hickman Road, Suite 1  
Windsor Heights, Iowa 50324  
Phone: 515/281-8563

**Payment of penalty to:**

Director of the Iowa DNR  
Wallace State Office Building  
502 East Ninth Street  
Des Moines, Iowa 50319-0034

**II. JURISDICTION**

This administrative consent order is issued pursuant to the provisions of Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part 1; Iowa Code chapter 459 and the rules adopted or permits issues pursuant thereto; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

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**III. STATEMENT OF FACTS**

1. Gary Elsbernd owns and operates an animal feeding operation located at 1538 230<sup>th</sup> Avenue, Calmer, Iowa (NE ¼ of the SE ¼ of Section 1, Washington Township, Winneshiek County). The facility is considered a small animal feeding operation with 272 milk cows, 40 heifers, and 40 calves in confinement and 63 dry cows, 18 heifers, and 52 calves on open lots.

2. On April 25, 2011, DNR Field Office 1 received a telephone call from Bill Kalishek, DNR Fisheries Biologist. Mr. Kalishek reported a fish kill in an unnamed tributary to the Turkey River south and southwest of Calmar, Iowa. Mr. Kalishek had received the report from Corey Meyer, Winneshiek County NRCS officer. Mr. Meyer had received a call from a concerned citizen. The citizen stated that dead fish were observed at the County Road B32 bridge over the unnamed tributary.

3. Mr. Kalishek and Theresa Shay, DNR Fisheries, went to the unnamed tributary to begin the investigation. They spoke to a Calmar city police officer who indicated that there had been a manure storage system failure at Mr. Elsbernd's facility the previous day. Mr. Kalishek and Ms. Shay observed dead fish at the County Road B32 bridge and observed what appeared to be the remnants of a manure spill upstream by the 155<sup>th</sup> Street bridge.

4. Tom McCarthy and Doug Hawker, DNR Field Office 1 staff, also began their investigation at the Highway 150 bridge. They observed dead minnows and/or chubs at the bottom of the stream and the field tests indicated slightly elevated levels of ammonia of about 3 ppm. There was a small amount of foam on the water surface.

5. Mr. McCarthy and Mr. Hawker then met the Fisheries personnel and talked once again to the Calmar police officer. He explained that Mr. Elsbernd's manure pit had failed over the weekend. The field office personnel and the Fisheries personnel traveled upstream to the 155<sup>th</sup> Street Bridge. The stream was murky and there was a slight odor of dairy manure. The field tests indicated the ammonia levels were greater than 3 ppm. The group did not observe any fish at this location. The Fisheries personnel directed the field office personnel upstream of the bridge as to where the manure release had occurred. At this point the Fisheries personnel began the fish kill count and the field office personnel met with Gary and Mike Elsbernd.

6. Mike Elsbernd, Gary's brother, met the group and stated that there had been a release of cow manure the previous day when the top two stop logs on the manure containment structure failed. He stated they discovered the failure the previous day and observed manure solids spread down the hill from the manure storage structure and along the banks of the unnamed tributary. He stated that he attempted to contact the DNR about the spill, but did not leave a message. He said

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that there had been wet weather and recent snowfall and the fields were too wet to land apply; therefore the manure level in the storage structure was full up against the stop logs. The field office personnel then met with Gary Elsbernd. Gary was actively cleaning out the manure storage structure at the time of the meeting. Gary stated he had called the field office earlier in the morning. Gary went on to detail the steps taken following the discovery of the discharge the previous day. He stated that he and his family had spent the previous afternoon and evening spreading hay over the manure solids to soak up the solids and to prevent any additional manure from entering the stream. He also stated that he began to empty the remaining manure from the storage pit.

7. Mr. Elsbernd explained that the pit had been designed by NRCS in the mid 1990s and that he had not had any issues with it. At the time of the investigation, Mr. Elsbernd had a contractor on site replacing the stop logs. The contractor was in the process of designing and installing additional metal support structures to ensure that the system worked properly. The field office personnel explained that the regulations have changed since the construction of the structure and informed Mr. Elsbernd that all the manure is considered confinement manure and must be contained at all times between periods of applications.

8. Following the meeting with Mr. Mr. Elsbernd, the field office personnel returned to the unnamed tributary and collected water samples upstream of the discharge, at the discharge, and downstream of the discharge. The upstream sample indicated an ammonia concentration of 0.09 mg/L; the discharge sample contained an ammonia concentration of 6.6 mg/L; and the downstream located contained an ammonia concentration of 1.9 mg/L.

9. On May 11, 2011, DNR issued a Notice of Violation letter to Mr. Elsbernd for the water quality and manure control violations observed during the inspection on April 25, 2011. The letter required Mr. Elsbernd to submit a plan of action to DNR Field Office 1 by June 15, 2011 detailing the steps that will be taken to come into compliance with the manure storage structure requirements. The letter included a copy of the inspection report and informed Mr. Elsbernd that the matter was being referred for further legal review.

10. DNR Fisheries led the fish kill assessment and the assessment determined that the manure discharge caused a 5.99 mile fish kill on an unnamed tributary of the Turkey River. The assessment calculated the number of fish killed as 16,454; with a monetary value of \$1,786.74. Investigative costs related to this incident totaled \$1,167.42 (\$480.13 for the Fisheries Bureau and \$687.29 for the Field Services Bureau).

11. On June 13, 2011, DNR Field Office 1 received the Plan of Action from Mr. Elsbernd. In the letter Mr. Elsbernd explained he worked with NRCS and has

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removed the boards in the structure and replaced them with concrete. He also has added gutters to the buildings to divert rainwater from the manure storage structure.

**IV. CONCLUSIONS OF LAW**

1. Iowa Code section 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. During DNR Field Office 1's investigation it was determined that manure from Mr. Elsbernd's facility was discharged into an unnamed tributary of the Turkey River. The above-mentioned facts indicate violations of these provisions.

2. 567 IAC 65.2(3) describes the minimum level of manure control for confinement feeding operations as the retention of all manure produced in the confinement enclosure between periods of waste disposal. 567 IAC 65.2(3) further states that in no case shall manure from the confinement feeding operation be discharged into a water of the state. During DNR Field Office 1's investigation it was determined that manure from Mr. Elsbernd's facility was discharged into an unnamed tributary of the Turkey River. The above-facts disclose violations of this provision.

3. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock watering; or are toxic to animal or plant life. The laboratory results indicated elevated pollutants and a fish kill was confirmed. The above mentioned facts indicate violations of the general water quality criteria.

4. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. The DNR has adopted 571 IAC 113. 571 IAC 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. A fish kill resulted from the manure discharge from Mr. Elsbernd's facility.

5. Iowa Code section 455B.392(1)(c) authorizes the DNR to hold a person having control over a hazardous substance strictly liable to the state for the damages to natural resources resulting from a hazardous condition caused by that person; damages includes the "costs of assessing the injury."

**V. ORDER**

THEREFORE, the DNR orders and Mr. Elsbernd agrees to do the following:

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1. Mr. Elsbernd shall pay fish restitution in the amount of \$1,786.74 and investigative costs in the amount of \$1,167.42 within 30 days of the date the Director signs this administrative consent order; and
2. Mr. Elsbernd shall pay an administrative penalty in the amount of \$1,500.00 within 30 days of the date the Director signs this administrative consent order.

**VI. PENALTY**

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to this chapter, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty of \$1,500.00. The administrative penalty is determined as follows:

Economic Benefit – Any economic benefit that Mr. Elsbernd received as a result of the violations has been minimized by the efforts of Mr. Elsbernd in cleaning up the discharge as well as preventing future discharges. Therefore, no amount is assessed for this factor.

Gravity – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. DNR Field Office 1 documented a manure discharge that led to documented water quality violations and a fish kill. These violations threaten the integrity of the regulatory programs because compliance with animal feeding operation requirements is required of all persons in this state. Therefore, \$1,400.00 is assessed for this factor.

Culpability – Mr. Elsbernd has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that his conduct is subject to DNR's rules. Therefore, \$100.00 is assessed for this factor.

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**VII. WAIVER OF APPEAL RIGHTS**

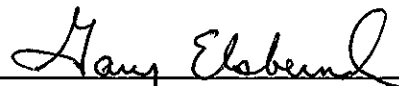
This administrative consent order is entered into knowingly and with the consent of Mr. Elsbernd. For that reason Mr. Elsbernd waives the right to appeal this administrative consent order or any part thereof.

**VIII. NONCOMPLIANCE**

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in this administrative consent order. Failure to comply with this administrative consent order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191.

  
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ROGER L. LANDE, DIRECTOR  
Iowa Department of Natural Resources

Dated this 19th day of  
July, 2011.

  
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GARY ELSBERND

Dated this 6th day of  
July, 2011.

Kelli Book, DNR Field Office 1, EPA, VIII.D.1.a and VIII.D.3.a

RECEIVED

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IDNR AIR QUALITY